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271 NLRB No. 33

D--1939
Jackson, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

O'HARROW CONTRUCTION CO.

and

Case 7--CA--22967

REINFORCING IRON WORKERS LOCAL 426
FRINGE BENEFIT FUNDS

DECISION AND ORDER

Upon a charge filed by the Reinforcing Iron Workers Local 426 Fringe Benefit Funds, the Charging Party, 4 January 1984,[1] the General Counsel of the National Labor Relations Board issued a complaint 3 February against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Company has failed to file an answer.

On 27 March the General Counsel filed a Motion for Default Judgment. On 30 March the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] All subsequent dates refer to 1984 unless otherwise indicated.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 10 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 10 days of service, ''all of the allegations in the Complaint shall be deemed to be admitted true and may be so found by the Board.'' Further, the undisputed allegations in the Motion for Default Judgment disclose that the Regional Attorney for Region 7, by letter dated 21 February, notified the Company that unless an answer was received by 5 March, a Motion for Default Judgment would be filed.[2]

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.[3]

On the entire record, the Board makes the following

Findings of Fact

I. Juridiction

The Company, a Michigan corporation, engages in general construction contracting at its facility in Jackson, Michigan, where it annually purchases and causes to be transported at its Jackson, Michigan place of business and/or jobsites located in the State of Michigan concrete and cement block valued in excess of $50,000 which is transported and received from other enterprises

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2 On 16 March counsel for the General Counsel spoke by phone to the Respondent's treasurer, who stated that the Respondent had received the Regional Attorney's 21 February letter. Also on 16 March counsel for the General Counsel sent a letter to the Respondent referring to the phone conversation and stating that, because no answer was filed, there was no alternative but to file a Motion for Default Judgment.

3 In granting the General Counsel's Motion for Default Judgment, Chairman Dotson specifically relies on the total failure of the Respondent to contest either the factual allegations or the legal conclusions of the General Counsel's complaint. Because this proceeding is a default judgment, the Chairman regards it as being without precedential value.

located in the State of Michigan, each of which other enterprises receives the concrete and cement block directly from suppliers located outside the State of Michigan. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Reinforcing Iron Workers, Local 426, International Association of Bridge, Structural and Ornamental Iron Workers, AFL--CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Since 27 September 1975 the Union has been the exclusive collective-bargaining representative of the employees in an appropriate unit.[4] The Respondent and the Union are parties to a contract which is effective from 1 June 1982 through 1 June 1984. The contract provides for the payment of moneys into the Charging Party and for the auditing, on demand by the Charging Party, of any and all of the Respondent's pertinent records.

About 24 October 1983 the Charging Party requested that the Respondent permit the Charging Party to conduct a contractually required audit of its books. About 21 November 1983 the Charging Party repeated its request. About 16 December 1983 the Charging Party requested that the Respondent remit the contractually required supplemental pension fringe benefit fund contributions of 75 cents per hour for each hour of work performed by unit employees. Since about 24 October 1983 the Respondent has failed and refused to allow the Charging Party to conduct an audit of its records as contractually required. Since about 4 July 1983 the Respondent has failed and refused to remit the

[4] All full-time and regular part-time reinforcing iron workers employed by the Respondent at its Jackson, Michigan place of business and jobsites located within the territorial jurisdiction of the Union; but excluding all guards and supervisors within the meaning of the Act.

contractually required supplemental pension fringe benefit fund contributions of 75 cents per hour for each hour of work performed by unit employees. By such acts, the Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Conclusions of Law

1. By failing and refusing to allow the Charging Party to conduct a contractually required audit of its records, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By failing and refusing to remit the contractually required supplemental pension fringe benefit fund contributions of 75 cents per hour for each hour of work performed by unit employees, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We have found that the Respondent failed to abide by the terms of the contract in effect between the parties in violation of Section 8(a)(5) and (1) of the Act. In order to dissipate the effects of its unlawful action, we shall order the Respondent to make the Charging Party whole by making contractually

required supplemental pension fringe benefit fund payments,[5] and by reimbursing its employees for any expenses ensuing from the Respondent's unlawful failure to make such required payments as set forth in Kraft Plumbing & Heating, Inc., 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest prescribed in Florida Steel Corp., 231 NLRB 651 (1977). See generally Isis Plumbing Co., 138 NLRB 716 (1962).

ORDER

The National Labor Relations Board orders that the Respondent, O'Harrow Construction Co., Jackson, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to allow the Charging Party to conduct an audit of its records as contractually required.

(b) Failing and refusing to remit the contractually required supplemental pension fringe benefit fund contributions of 75 cents per hour for each hour of work performed by unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[5] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of the funds withheld, additional administrative costs, etc., but not collateral losses. Merryweather Optical Co., 240 NLRB 1213 (1979).

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately furnish to the Charging Party, or its agents, any and all pertinent records necessary for conducting a full and complete audit.

(b) Make whole the Charging Party by making contractually required supplemental pension fringe benefit fund payments accruing since 4 July 1983, and reimburse unit employees for any expenses ensuing from the Respondent's unlawful failure to make such required payments in the manner set forth in the section of this Decision entitled ''Remedy.''

(c) Post at its facility in Jackson, Michigan, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 13 July 1984

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to allow the Reinforcing Iron Workers Local 426 Fringe Benefit Funds to conduct an audit of our records as contractually required.

WE WILL NOT fail and refuse to remit the contractually required supplemental pension fringe benefit fund contributions of 75 cents per hour for each hour of work performed by unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately furnish to the Reinforcing Iron Workers Local 426 Fringe Benefit Funds or its agents any and all pertinent records necessary for conducting a full and complete audit.

WE WILL make whole the Charging Party by making contractually required supplemental pension fringe benefit fund payments accruing since 4 July 1983, and WE WILL reimburse unit employees for any expenses, plus interest, ensuing from our unlawful failure to make such required payments.

O'HARROW CONSTRUCTION CO.

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, Room 300, 477 Michigan Avenue, Detroit, Michigan 48226, Telephone 313--226--3244.